

CR 88-23

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Revisor of Statutes
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STATE OF WISCONSIN
OFFICE OF THE STATE PUBLIC DEFENDER

I, Daniel M. Berkos, Chair of the State Public Defender board and custodian of the official records, certify that the annexed rules relating to certification of the private bar payment of the private bar and determination of indigency were duly approved and adopted by this board on October 21, 1988.

I certify that this copy has been compared by me with the original on file in this Office and that the same is a true copy thereof, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name in the City of Madison, State of Wisconsin, this 13th day of March, 1990.



DANIEL M. BERKOS
Chair, State Public Defender Board

5-1-90

ORDER OF THE STATE PUBLIC DEFENDER BOARD RENUMBERING, AMENDING AND CREATING RULES

An order to renumber ss. SPD 3.03(1)(b) and (c), and SPD 4.03(2), (3), (4), and (5); to amend ss. SPD 1.04(5)(a), SPD 2.07(1)(intro.), (a) and (b)3, SPD 3.03(2), SPD 3.04(1), SPD 4.02, and SPD 4.03(1); and to create ss. SPD 2.07(3), SPD 3.03(1)(b), SPD 3.038, SPD 4.025, and SPD 4.03(2) and (3), relating to certification of the private bar, payment of the private bar, and determination of indigency.

Analysis

The proposed amendments and rules authorize the State Public Defender to require that private attorneys must have filed briefs in an appellate court within the preceding three years to be certified to take appellate cases; specify how payment will be made to privately-retained attorneys who are subsequently appointed to the same case by the State Public Defender; eliminate bail as an allowable expense in indigency determinations; clarify the indigency determination process; and clarify payment procedures for the private bar.

Statutory authority: s. 977.02, Stats.

Statutes interpreted: ss. 977.02(7), 977.07, and 977.08(3), (4) and (4m), Stats.

SECTION 1

SPD 1.04(5)(a) is amended to read:

SPD 1.04(5)(a): The attorney has filed a brief in the Wisconsin supreme court or Wisconsin court of appeals in no less than one felony case or 2 misdemeanor cases ~~since July 1, 1978 within the three years immediately preceding the application for certification~~, and has completed the continuing legal education required by these rules; or

SECTION 2

SPD 2.07(1)(intro.), (a) and (b)3 are amended to read:

SPD 2.07(1) If it is necessary for a person to obtain publicly compensated counsel after having retained counsel because of the lack of sufficient funds, the attorney who was originally retained may be assigned and publicly compensated if either:

(a) The court finds that the interests or administration of justice will be severely damaged by a change in counsel; ~~or and~~

1. It appears that the attorney had a reasonable expectation of receiving his or her entire fee when he or she was retained;

2. The necessity for publicly compensating this retained counsel has occurred no more than once in the preceding 12 months; and

3. The client and attorney consent; or

(b) The retained attorney is certified to provide such representation; and

1. It appears that the attorney had a reasonable expectation of receiving his or her entire fee when he or she was retained;

2. The necessity for publicly compensating this retained counsel has occurred no more than once in the preceding 12 months; and

3. The state public defender, client and attorney consent.

SECTION 3

SPD 2.07(3) is created to read:

SPD 2.07(3) The method provided under s. SPD 4.025 shall be used to calculate the compensation by the state public defender of the private attorney appointed under sub. (1).

SECTION 4

SPD 3.03(1)(b) and (c) are renumbered SPD 3.03(1)(c) and (d).

SECTION 5

SPD 3.03(1)(b) is created to read:

SPD 3.03(1)(b) Any money belonging to the person and expended to post bond to obtain release regarding the current alleged offense;

SECTION 6

SPD 3.03(2) is amended to read:

SPD 3.03(2) The "amount required to provide the necessities of life," means the payment amount specified in s. 49.19(11)(a)1, Stats., plus other specified, emergency, or essential costs and the cost of posting bond to obtain release.

SECTION 7

SPD 3.038 is created to read:

SPD 3.038 Calculation of indigency. A person's available assets as determined under s. SPD 3.03 shall be compared to the anticipated cost of retaining counsel as specified under s. SPD 3.02 as follows:

- (1) If the available assets are less than or equal to \$100, the person is indigent.
- (2) If the available assets are greater than \$100, but less than or equal to the anticipated cost of retaining counsel, the person is partially indigent.
- (3) If the available assets are greater than the anticipated cost of retaining counsel, the person is not indigent.

SECTION 8

SPD 3.04(1) is amended to read:

SPD 3.04 Partial indigency. (1) If the person has insufficient assets to retain counsel, the state public defender shall provide counsel under s. 977.08, Stats., and the court or the state public defender may require the person to make payments to the state in partial payment of legal fees, at the prevailing state public defender hourly rate. The payments shall be equivalent to the full amount of available assets, except payments may not exceed the actual value of the legal services as determined in s. SPD 3.02(1).

SECTION 9

SPD 4.02 is amended to read:

SPD 4.02 Submission of bill. Within 6 months of the conclusion of the case, the private attorney shall submit the billing form to the local office of the state public defender. The state public defender shall promptly review the bill to insure that attorney time billed reflects reasonable attorney practice in such a case, as determined by the state public defender, and promptly authorize payment at the rate established under s. 977.08(4m), Stats. The "conclusion of the case" means the conclusion of trial-level representation for trial cases and the conclusion of appellate-level representation for appellate cases. If the bill is not submitted within 6 months of the conclusion of the case, the state public defender is not required to pay the bill promptly.

SECTION 10

SPD 4.025 is created to read:

SPD 4.025 Compensation for public representation after case commenced by retained counsel. (1) Except as provided in sub. (3), if privately retained counsel is appointed by the state public defender under s. SPD 2.07(1), the total amount reimbursed by the state public defender to that attorney may not exceed an amount equal to the total number of hours shown by contemporaneous time records to have been reasonably expended on the case by that attorney multiplied by the rate the state public defender is authorized by statute to pay private attorneys, less any fees paid to the attorney by or on behalf of the client. The attorney's expenses are not included in the computation of the maximum amount reimbursable by the state public defender.

(2)(a) Fees, if any, paid by or on behalf of the client shall first be applied to the period of legal representation prior to the effective date of assignment by the state public defender, using the number of hours shown by contemporaneous time records to have been reasonably expended on the case by that attorney during that period multiplied by the rate the state public defender is authorized by statute to pay private attorneys.

(b) Any fees received by the attorney from or on behalf of the client in excess of the amount calculated under par. (a) shall be applied to the period of representation after the effective date of assignment by the state public defender and subtracted from the total amount reimbursable by the state public defender under sub. (1).

(3) The state public defender may, in his or her discretion, use a reasonable hourly rate that is greater than the amount authorized by statute to compute the allowable fees calculated under par. (2)(a) for the period of representation prior to assignment by the state public defender, if all of the following apply:

(a) The privately retained attorney had a written fee agreement which was signed by the client at the beginning of the attorney's representation;

(b) The attorney had a reasonable expectation of being paid fully for representation of the client at the beginning of the representation, and that expectation is supported by the written fee agreement;

(c) The attorney maintained contemporaneous time records for all time expended in the representation of the client; and

(d) The state public defender finds that the fee paid to the attorney by or on behalf of the client prior to the appointment of publicly compensated counsel was reasonable.

(4) The amount reimbursed by the state public defender may not exceed the amount computed by multiplying the rate the state public defender is authorized by statute to pay times the number of hours actually expended by the attorney in this representation after the effective date of assignment by the state public defender.

Note: The State Public Defender Board presumes access to the attorney's contemporaneous time records of the case as necessary to implement s. SPD 4.025.

SECTION 11

SPD 4.03(1) is amended to read:

SPD 4.03 Appeal. (1) Any attorney may appeal the state public defender's reduction of any submitted bill by mailing a letter of appeal to the state public defender within 30 days of receipt of the reduced payment. During the pendency of the appeal the attorney may negotiate the check for the reduced payment without waiver of the right to appeal. An appeal of the reduction shall conform with all of the following:

(a) Notice of the appeal is in writing;

(b) Notice is submitted within 30 days of the receipt of the reduced payment; and

(c) Delivery of the notice is by mail or in person.

SECTION 12

SPD 4.03(2), (3), (4), and (5) are renumbered SPD 4.03 (4), (5), (6), and (7).

SECTION 13

SPD 4.03(2) and (3) are created to read:

SPD 4.03(2) Failure to submit an appeal notice within 30 days shall bar the appeal.

(3) During the pendency of the appeal the attorney may negotiate the check for the reduced payment without waiver of the right to appeal.

Effective Date: These rule changes shall take effect on the first day of the month following publication in the Wisconsin administrative register, pursuant to s. 227.22(2)(intro.), Stats.

Dated:

Wisconsin State Public Defender Board

By: 
DANIEL M. BERKOS, Chair
State Public Defender Board



State Public Defender
Nicholas L. Chiarkas

Deputy State Public Defender
Eileen Hirsch

**THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER**

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Chief, Trial Division
Marcus T. Johnson

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Kenneth P. Casey

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Revisor of Statutes
Bureau

Gary Poulson
Office of the Revisor of Statutes
30 W. Mifflin Street - Room 702
Madison, Wisconsin 53703

RE: Clearinghouse rule 88-23

Dear Mr. Poulson:

Attached please find a certified copy of Clearinghouse rule 88-23 for promulgation. I have also attached an extra copy for printing of the rule. It is my understanding that this rule will be published on April 1, 1990 and will become effective on May 1, 1990. Please notify me immediately at 266-6782 if this is not the case.

Thank you.

Sincerely,

Evelyn Mazack
Evelyn Mazack
Assistant State Public Defender